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Andrew Lee Siew Ling v United Overseas Bank (M) Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()–79–12 OF 2011(J)
ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, AHMAD MAAROP, ZALEHA ZAHARI AND SULONG MATJERAIE FCJJ
27 NOVEMBER 2012

C

Bankruptcy — Secured creditor — Guarantee — Secured creditor lent monies to borrower against security of charge over lands and letter of guarantee and indemnity — Secured creditor took steps to sell charged lands several years after borrower wound up — Whether in suit against guarantor for borrower's debt guarantor could invoke s 8(2A) of the Bankruptcy Act 1967 to prevent interest being claimed on debt after date of borrower's winding up — Whether s 8(2A) could benefit guarantors and indemnifiers — Whether guarantor liable as principal debtor for having given indemnity

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The respondent had granted a company ('Monzo') an interest-bearing loan of RM1m secured by a charge over two pieces of land and a letter of guarantee and indemnity ('the guarantee') executed by the appellant and another person. Monzo defaulted under the loan and was wound up in 2002. The respondent obtained a court order to sell the charged lands in 2006 and sued the appellant under the guarantee. In 2009, the High Court allowed the respondent's application for summary judgment against the appellant but limited the judgment sum to the amount owing at the date of Monzo's winding-up. The Court held s 8(2A) of the Bankruptcy Act 1967 ('the Act') read with s 4(1) of the Civil Law Act 1956 precluded the respondent as secured creditor from claiming interest on the debt after the date of the winding up order as it failed to realise the charged properties within six months of the date of the winding up as provided under s 8(2A). The court held s 8(2A) applied for the benefit of not only the borrower but also the guarantor. The Court of Appeal allowed the respondent's appeal holding s 8(2A) did not affect the guarantor but only limited the secured creditor's right to claim further interest on the debt as against the bankrupt or wound up debtor and the property of that debtor. The Federal Court granted the appellant leave to appeal to it against the Court of Appeal's decision. The appellant argued that the Court of Appeal's decision could not be right as it meant his liability to the respondent as guarantor was greater than what the borrower (Monzo) was statutorily liable for. It was submitted that nothing in s 8(2A) excluded its applicability to guarantors.

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Held, dismissing the appeal with costs:

(1) Section 8(2A) did not apply to the appellant who was a guarantor cum

indemnifier. Section 8 of the Act dealt with the property or person of a debtor against whom a receiving order had been made. Sections 8(2) and 8(2A) dealt with what the secured creditor could and could not do in respect of realising or otherwise dealing with its security where the debtor was concerned. Nothing in those two sections suggested that they governed the properties or persons of parties against whom no receiving order had been made (see paras 11 & 14).

(2) The appellant was not the 'debtor' envisaged in s 8(1) of the Act. No receiving order was made against him. As such s 8(2) did not apply to him and it followed that the exception to that section, ie s 8(2A), also did not apply to him. It was not Parliament's intention in enacting Section 8(2A) to affect the interest of the secured creditor vis-à-vis any guarantor or indemnifier (see paras 15 & 20).

(3) Section 8(2A) applied only when a secured creditor was realising its security against the bankrupt debtor. It must be read in the context of and together with ss 8(1) and 8(2) of the Act. The intent and purpose of s 8(2A) was to clamp interest claimable by the secured creditor against the bankrupt debtor to protect both the unsecured creditors of the bankrupt debtor as well as the bankrupt debtor himself. It was to ensure the level of the debt would not increase and the share that each unsecured creditor had on the assets of the debtor would not be diminished (see paras 12 &16).

(4) The letter of guarantee and indemnity contained several clauses which clearly showed the intention of the guarantors to undertake liability for the repayment of the term loan and interest not merely as sureties but also as principal debtors and indemnifiers. The appellant, having given a guarantee and more importantly an indemnity, was primarily liable for losses which the principal borrower could not have been made liable for. His liability was not dependent or secondary to the liability of the principal borrower. He was a principal debtor himself (see paras 22–23).

(5) The liability under a contract of indemnity did not depend on whether the principal debt was enforceable. It had no reference in law to the obligation of any third person. The liability of the person who had given an indemnity could be more extensive than the liability of the principal borrower (see para 23).

[Bahasa Malaysia summary

Responden telah memberikan syarikat ('Monzo') pinjaman berfaedah sebanyak RM1 juta yang dijamin oleh caj ke atas dua keping tanah dan surat jaminan dan indemniti ('jaminan') dimeterai oleh perayu dan seorang lagi. Monzo gagal membuat bayaran di bawah pinjaman dan telah digulung pada tahun 2002. Responden mendapat perintah mahkamah untuk menjual tanah yang dikenakan pada tahun 2006 dan menyaman perayu di bawah jaminan.

Pada tahun 2009, Mahkamah Tinggi membenarkan permohonan responden untuk mendapatkan penghakiman terhadap perayu tetapi mengehadkan jumlah penghakiman untuk amaun terhutang pada tarikh penggulungan Monzo. Mahkamah memutuskan bahawa s 8(2A) Akta Kebankrapan 1967 ('Akta') dibaca dengan s 4(1) Akta Undang-Undang Sivil 1956 menghalang responden sebagai pemiutang bercagar daripada menuntut kepentingan atas hutang selepas tarikh penggulungan sehingga perintah kerana ia gagal untuk merealisasikan sifat yang dikenakan dalam tempoh enam bulan dari tarikh penggulungan sebagaimana yang diperuntukkan di bawah s 8(2A). Mahkamah memutuskan s 8(2A) digunakan untuk manfaat bukan sahaja peminjam tetapi juga penjamin. Mahkamah Rayuan membenarkan rayuan responden dan memutuskan s 8(2A) tidak menjejaskan penjamin tetapi hanya mengehadkan hak pemiutang bercagar untuk menuntut kepentingan lanjut bagi hutang terhadap bankrap atau penghutang yang digulung dan harta penghutang itu. Mahkamah Persekutuan memberikan keizinan untuk perayu merayu terhadap keputusan Mahkamah Rayuan. Perayu menghujahkan bahawa keputusan Mahkamah Rayuan tidak boleh menjadi tepat kerana ia bermakna liabiliti kepada responden sebagai penjamin adalah lebih besar daripada apa yang menjadi tanggungan peminjam (Monzo) di bawah undang-undang. Dihujahkan bahawa tiada apa-apa jua dalam s 8(2A) yang mengecualikan keterpakaiannya kepada penjamin-penjamin.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 8(2A) tidak terpakai kepada perayu yang merupakan seorang penjamin merangkap penanggung kerugian. Seksyen 8 Akta tersebut adalah berkenaan dengan harta atau orang penghutang yang terhadapnya suatu perintah penerimaan telah dibuat. Seksyen 8(2) dan 8(2A) adalah berkenaan dengan apa yang pemiutang bercagar boleh dan tidak boleh lakukan dalam merealisasikan atau sebaliknya berurusan dengan cagaran yang melibatkan penghutang. Tiada apa-apa jua dalam kedua-dua peruntukan mencadangkan bahawa mereka mentadbir harta atau pihak-pihak yang mana tiada perintah penerimaan dibuat terhadapnya (lihat perenggan 11 & 14).

(2) Perayu bukan 'penghutang' yang dimaksudkan dalam s 8(1) Akta tersebut. Tiada perintah penerimaan telah dibuat terhadapnya. Oleh itu s 8(2) tidak terpakai kepadanya dan berikutan itu pengecualian kepada seksyen tersebut, iaitu s 8(2A), juga tidak terpakai kepadanya. Ia bukan niat Parlimen dalam menggubal s 8(2A) untuk menjejaskan kepentingan pemiutang bercagar berkaitan penjamin atau mana-mana penanggung hutang (lihat perenggan 15 & 20).

(3) Seksyen 8(2A) hanya terpakai apabila pemiutang bercagar telah merealisasikan cagaran mereka terhadap penghutang bankrap. Ia mestilah dibaca dalam konteks dan bersama-sama dengan s 8(1) dan 8(2)

Akta. Niat dan tujuan s 8(2A) adalah untuk mengapit faedah boleh tuntut oleh pemiutang bercagar terhadap penghutang bankrap untuk melindungi kedua-dua pemiutang tidak bercagar penghutang muflis serta penghutang bankrap sendiri. Ia adalah untuk memastikan tahap hutang tidak akan meningkat dan bahagian setiap pemiutang tidak bercagar atas aset penghutang tidak akan berkurangan (lihat perenggan 12 & 16).

(4) Surat jaminan dan indemniti mengandungi beberapa klausa yang jelas menunjukkan niat penjamin untuk menjalankan liabiliti bagi pembayaran balik pinjaman berjangka dan kepentingannya bukan sahaja sebagai penjamin tetapi juga sebagai penghutang utama dan penanggung hutang. Perayu, setelah diberi jaminan dan lebih penting lagi, ganti rugi, adalah terutamanya bertanggungan bagi kerugian yang mana peminjam utama tidak dapat dipertanggungjawabkan. Tanggungannya tidak bergantung atau sekunder kepada liabiliti peminjam utama. Dia adalah penghutang utama sendiri (lihat perenggan 22–23).

(5) Liabiliti di bawah kontrak indemniti tidak bergantung kepada sama ada hutang utama boleh dikuatkuasakan. Ia tidak mempunyai rujukan di sisi undang-undang kepada kewajipan mana-mana pihak ketiga. Liabiliti seseorang yang telah memberi indemniti boleh menjadi lebih luas daripada liabiliti peminjam utama (lihat perenggan 24).]

Notes

For a case on guarantee, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3622.

Cases referred to

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, FC (refd)

Chung Khiaw Bank Ltd v Soi Huan & Ors [1986] 1 MLJ 188, HC (refd)

Yeoman Credit Ltd v Latter & Anor [1961] 2 All ER 294, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8, 8(1), (2), 8(2A)

Civil Law Act 1956 s 4(1)

Interpretation Acts 1948 and 1967 s 17A

Appeal from: Civil Appeal No J–02–(1M)–2768 of 2009 (Court of Appeal, Putrajaya)

Bastian Vendargon (PK Nathan, T Gunaseelan, Ng Chew Hor & Gene Vendargon with him) (PK Nathan & Co) for the appellant.

Ng Sai Yeang (Lim Siew Ming & Loke Yuen Hong with him) (Raja Daryl & Loh) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court entering judgment in favour of the respondent in the sum of RM1,022,134.75 being the amount due as at the date of the winding up order of a company known as Monzo (M) Sdn Bhd ('Monzo').

BACKGROUND FACTS

[2] The relevant background facts of this case may be summarised as follows:

(a) the respondent, a licensed bank, granted a term loan of RM1,000,000 ('the loan') to Monzo at the interest rate of 1.75%pa in addition to the respondent's prevailing base lending rate;

(b) the loan was secured by a charge over two pieces of land situated in the Mukim of Plentong, District of Johor Bahru. The loan was also secured by a letter of guarantee and indemnity executed by the appellant and one Mok Hwee Huan;

(c) Monzo defaulted in payment and it was subsequently wound up by a separate action in the Kuala Lumpur High Court on 19 June 2002;

(d) the respondent then commenced this suit against the appellant and Mok Hwee Huan. However, Mok Hwee Huan was adjudged bankrupt in Singapore on 25 Oktober 2002. The respondent obtained the order for sale of the charged lands on 25 July 2006;

(e) the respondent applied for summary judgment against the appellant. The appellant contested the respondent's application only with regard to the amount due to the respondent; and

(f) among the issues before the High Court is whether the respondent can, in law, claim interest after 19 June 2002, that is the date of winding up order of Monzo, by virtue of s 8(2A) of the Bankruptcy Act 1967 ('the Act') read together with s 4(1) of the Civil Law Act 1956. The evidence shows that the amount due to the respondent as at 19 June 2002 is RM1,022,134.75.

FINDINGS OF THE HIGH COURT

[3] On 21 October 2009, the learned High Court judge entered judgment in

favour of the respondent in the sum of RM1,022,134.75, the amount due as at the winding up order of Monzo and ordered each party to bear their own costs. The learned High Court judge held that sub-s 8(2A) of the Act acts as a statutory clamp on secured creditors prohibiting them from claiming any further interest on the debt after the winding up of a company if the secured creditors fail to realise their security within the period of six months as mandated by that subsection. The prohibition attaches to the debt so as to prohibit the secured creditors from claiming interest beyond that period, not only from the borrower, but also from the guarantors.

FINDINGS OF THE COURT OF APPEAL

[4] Dissatisfied with the decision of the High Court, the respondent appealed to the Court of Appeal. On 14 July 2011, the Court of Appeal allowed the respondent's appeal with costs and held that the interpretation of sub-s 8(2A) of the Act is that it merely limits the secured creditor's right to continue to impose interest on the amount outstanding to him vis a vis the bankrupt or wound up debtor and the property of that debtor.

LEAVE TO APPEAL TO THE FEDERAL COURT

[5] Aggrieved by the decision of the Court of Appeal, the appellant sought for leave to appeal to the Federal Court. On 5 December 2011, the Federal Court granted the appellant leave to appeal on the following question of law:

> Can a secured creditor in law, claim interest, inter alia, from a guarantor, and/or person whose liability is pursuant to a guarantee and/or indemnity, and/or a third party chargor, after the date of winding up of a borrower company or the receiving order if it does not realize its security within six months of the winding up order or receiving order made against the borrower, as a consequence of s 8(2A) of the Bankruptcy Act 1967 read together with s 4(1) of the Civil Law Act 1956?

DECISION

[6] The only issue for the determination of this court based on the factual circumstances of the present case is on the correct interpretation to be given to the provision of s 8(2A) of the Act which reads as follows:

> Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[7] In the context of the present case and in relation to the position of a

wound up company, the provision of s 8(2A) of the Act has to be read together with s 4(1) of the Civil Law Act 1956 which provides as follows:

> In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

[8] Learned counsel for the appellant amongst others submitted before us that the appellant as a guarantor had only guaranteed the amount legally and statutorily due to the respondent from the principal debtor in respect of the debt. It is the contention of the appellant that the appellant's liability as a guarantor to the respondent cannot be more than what the principal debtor (the borrower) is statutorily liable for. If this is not the purpose and intent for which s 8(2A) of the Act was passed by Parliament then all guarantors will be left at the mercy of lenders and chargees who can take their own sweet time or drag their feet to realise their security.

[9] Learned counsel for the appellant also submitted that the Court of Appeal ought to have dealt with the question of whether the respondent can contract out of the provision of s 8(2A) of the Act. There is nothing in s 8(2A) of the Act to allow parties to contract out of this provision. It is the contention of the appellant that the Court of Appeal erred in law in applying the terms of the letter of guarantee and indemnity executed between the appellant and the respondent to defeat the limiting provisions enacted under s 8(2A) of the Act.

[10] It was further submitted for the appellant that the Court of Appeal had imported words into s 8(2A) of the Act in its interpretation of the said section, and by doing so, had excluded its effect in relation to guarantors when there is nothing in s 8(2A) itself to exclude its applicability to guarantors. On this point learned counsel for the appellant contended that the Court of Appeal failed to take into consideration s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. According to the appellant's counsel the interpretation of s 8(2A) given by the Court of Appeal would lead to an unjust result as the guarantor becomes liable for a larger debt than that of the borrower who took the benefit of the loan.

[11] With respect to the above contention of the appellant we find no merits in the argument made before us. We are in agreement with the interpretation

given by the Court of Appeal that s 8(2A) of the Act does not apply to the appellant who is a guarantor cum person giving indemnity for the following reasons:

[12] It is our considered view that s 8(2A) of the Act applies only when a secured creditor is realising its security against the bankrupt debtor. Section 8(2A) must be read in the context of and together with sub-s (1)–(2) of s 8 of the Act. For completeness the whole provision of s 8 of the Act is reproduced as follows:

8.

(1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed - nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 [Act 265] of the States of Peninsular Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

(3) On a receiving order being made against a debtor he shall, within twenty-four hours after such order has been served upon him file an affidavit in the office of the Director General of Insolvency, containing a true and correct statement of the names and residences of all the partners, if any, in his business and of his principal assets and liabilities. Such statement shall for the purposes of this Act be deemed to be part of the debtor's statement of his affairs referred to in section 16.

(4) On such order as aforesaid being made against a debtor the Director General of Insolvency shall forthwith take possession of all books of account and other papers and documents in the possession, custody or control of the debtor relating to his property or affairs, and may take into his possession all or any deeds, books, documents and other property of the debtor.

[13] Section 8(2A) of the Act comes under the purview of s 8 of the Act

entitled 'Effect of receiving order'. It is an exception to s 8(2) of the Act. As an exception to s 8(2), s 8(2A) provides a limitation as to the entitlement of interest by a secured creditor. It states that the secured creditor shall not be entitled to any interest in respect of his debt after the making of the receiving order, if he does not realize his security within six months from the date of the order.

[14] It must be noted that s 8 of the Act deals with the property or person of the debtor against whom a receiving order has been made. Section 8(2) and s 8(2A) of the Act deal with what the secured creditor can and cannot do in respect of realising or otherwise dealing with his security where the debtor is concerned. Nothing in these two sections suggests that they govern the properties or persons of parties against whom no receiving order is made.

[15] It is our finding that the appellant is not the 'debtor' envisaged in s 8(1) of the Act. In this regard, there is no receiving order made against the appellant. As such, s 8(2) does not apply to him. Thus, if s 8(2) is not applicable to the appellant, it follows too that the exception to that section, ie s 8(2A), will also not be applicable to him.

[16] We are further of the view that the appellant's liability, being a person giving the indemnity is primarily separate and independent from any other person. He can be made liable for losses which the principal borrower (Monzo) could not have been made liable. The intent and purpose of s 8(2A) of the Act is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. This is to ensure that the level of debt would not increase, and the share that each unsecured creditor has on the assets of the debtor would not be diminished.

[17] We do not agree with the submission of learned counsel for the appellant that the Court of Appeal failed to address its mind to the wisdom of the statutory provision as contained in s 17A of the Interpretation Acts 1948 and 1967 ('Interpretation Act') which provides for a purposive approach in the interpretation of statutes. It was contended for the appellant that such an interpretation as given by the Court of Appeal would lead to an unjust result in that the guarantor becomes liable for a larger debt than that of the borrowers who had the use and benefit of the loan.

[18] Section 17A of the Interpretation Acts provides that:

> A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, inter alia, as follows:

> In summarizing the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
>
> (1) *Legislation is always to be understood first in accordance with its plain meaning.*
>
> (2) *Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.*
>
> (3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.*
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
>
> (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.
>
> The choice prescribed in s 17A of '… a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object …' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. *Thus, it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s 17A.* (Emphasis added.)

[19] In accordance with the principles laid down in the above case of *All Malayan Estates Staff Union*, it is noted that the Court of Appeal in the present case had in fact applied the provisions of s 17A of the Interpretation Acts in its interpretation of s 8(2A) of the Act in coming to its decision in allowing the respondent's appeal. This is so because the plain meaning of s 8(2A) makes it necessary for this court to answer the question posed in the affirmative.

Further, even where the plain meaning of s 8(2A) of the Act is in doubt the broad purpose of the Act can only result in an affirmative answer to the question before this court.

[20] We are of the view that a reading of s 8(2A) of the Act in the way interpreted by the respondent would advance the purpose of the Act and does no violence to the plain meaning of both the Act and the said s 8(2A). Conversely, the appellant's interpretation of that section would not advance the purpose of the Act and s 8(2A). We agree with the views expressed by the Court of Appeal in the present case that it was not the intention of Parliament in enacting sub-s 8(2A) of the Act to affect the interest of the secured creditor vis a vis any guarantor or indemnifier.

[21] On the issue of whether the respondent can contract out of the provision of s 8(2A) of the Act by using the terms of the letter of guarantee and indemnity executed between the appellant and the respondent to defeat the limiting provisions enacted under s 8(2A) of the Act as raised by the appellant, we are of the view this is a non-issue and should not arise at all.

[22] It is our finding that the letter of guarantee and indemnity contained several clauses which clearly show the intention of both guarantors to undertake the liability for the repayment of the term loan and interest therein not merely as sureties but also as a principal debtors as well as indemnifiers. The relevant cll 9, 17 and 21 of the letter of guarantee and indemnity are reproduced as follows:

Clause 9

Though as between us and the Customer we are sureties only for the Customer, yet as between you and us we shall be deemed to be principal debtors for all the monies the payment of which is hereby guaranteed and accordingly we shall not be discharged nor shall our liability be affected in any way by any fact circumstance act omission or means whatsoever whether known to you or not whereby our liability hereunder would have been discharged if we had not been principal debtors.

Clause 17

As a separate and independent stipulation we hereby agree that in the event the monies hereby guaranteed may not be recoverable on the footing of a guarantee, whether by reason of any legal limitation, disability or incapacity on the part of the Customer or any other fact or circumstance, and whether known to you or us or not, shall nevertheless be recoverable from us as sole or principal debtor in respect of it and shall be paid by us on demand.

Clause 21

For the consideration aforesaid and as a separate and independent stipulation in addition to and not in derogation of the guarantee herein given we hereby irrevocably and unconditionally undertake to indemnify you and keep you

indemnified fully and completely against all claims and demands actions and proceedings losses damages costs and expenses including legal costs as between a solicitor and client and all other liabilities of whatsoever nature or description which may be made taken incurred or suffered by you in connection with or in any manner arising out of the Facilities.

[23] It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower (see the cases of (1) *Yeoman Credit Ltd v Latter & Anor* [1961] 2 All ER 294 and (2) *Chung Khiaw Bank Ltd v Soi Huan & Ors* [1986] 1 MLJ 188).

CONCLUSION

[24] For the reasons abovestated we would answer the question posed in the affirmative. In the result the appeal is dismissed with costs. We award costs of RM15,000 to the respondent. The deposit to be paid to the respondent towards costs.

Appeal dismissed with costs.

Reported by Ashok Kumar